QRC Submission

Productivity Commission Draft Report on Resources Sector Regulation

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QUEENSLAND resources COUNCIL

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1. INTRODUCTION

The Queensland Resources Council (QRC) welcomes the opportunity to provide feedback on the Productivity Commission's *Draft Report on Resources Sector Regulation* (the Draft Report).

QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy exploration, production, and processing companies, and associated service companies. QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

QRC previously provided a submission on the Issues Paper as released by the Productivity Commission in September 2019. Pleasingly, the Draft Report reflects many of the longstanding issues raised by QRC and the resources sector, including that "*regulatory processes remain unduly complex, duplicative, lengthy and uncertain and may be becoming more so*[1]". The findings clearly demonstrate a need for significant improvement in resource-related regulation and administration.

The Draft Report, considered alongside other current reviews, describes reforms for a coordinated, integrated and consistent approach to resource sector regulation while continuing to create community benefits and safeguard the environment. QRC generally **supports** the majority of the findings, leading practices and recommendations outlined in the Draft Report. In this regard, this submission focuses on:

- Providing additional commentary to build upon or improve the context of selected draft leading practices, findings and recommendations (consistent with the structure of the Draft Report);
- Responding to the information requests;
- Recommending an approach to reform prioritisation to help guide governments in implementation; and
- How the outcomes of the Draft Report, if implemented by governments, could aid in the economic recovery to the novel coronavirus (COVID-19) pandemic.

QRC also draws the Productivity Commission's attention to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). In response to the review, QRC developed a Joint Industry Submission with the Minerals Council of Australia and its kindred bodies, which recommended:

- Leading regulatory practice, including (but not limited to):
    - Advocacy for a risk-based and outcomes-driven approach to regulation supported by fit-for-purpose, clear, time-based and predictable assessment and approvals processes;
    - Improving the administration of the Act, its policies, processes and tools (particularly offsets) through published, unambiguous guidance and open and transparent regulator communication;

[1] Draft Report, page 2

- Rationalising regulation and processes to reduce unnecessary duplication, time and cost burdens, including (but not limited to):
    - Removal of the water trigger for coal seam gas and large coal mining development;
    - Improved cooperation and coordination between the Commonwealth and State/Territory governments;
- Enhancing regulator performance and service delivery with the need for capable and accountable staff;
- Upgrading systems and consolidating data with regular updates; and
- Building community awareness and confidence while reducing the vulnerability of approvals to unnecessary appeals.

A copy of this submission is available on the EPBC Act Review website for the Productivity Commission's consideration.

On 20 July 2020, the Independent Reviewer of the EPBC Act review released his Interim Report (the Interim Report). QRC welcomes reform pathways generally consistent with the above priorities. However, it has diverging views on some views and recommendations in the Interim Report, which will be responded to separately.

Reform of the same or similar nature under the EPBC Act review and the Productivity Commission's review should be advanced in unison. Where applicable, QRC identifies these opportunities in this submission and provides commentary with the respect of the Interim Report.

In addition, QRC has also recently published its Streamlining Report, which seeks to instigate continuous improvement through streamlining assessment processes in Queensland for the resources sector. It builds on work led by QRC in 2010, after the Global Financial Crisis, when the resources sector was also seen as a foundation for economic recovery.

The Streamlining Report is relevant to a number of questions raised in the Productivity Commission's Draft Report and particularly focuses on the following four themes accompanied by 20 recommendations:

- Predictability for decision timeframes;
- Land access support and process;
- Streamlining duplicative processes; and
- Improving people, process and systems.

2. DRAFT LEADING PRACTICES, FINDINGS AND RECOMMENDATIONS

2.1. MANAGING RESOURCES DEVELOPMENTS IN THE INTERESTS OF THE COMMUNITY

2.1.1. Draft leading practices

DLP 4.3, Role of independent institutions

QRC agrees with DLP 4.3 that independent institutions can have a valuable role to play in providing information to landholders and the broader community. In particular, the Gas Industry Social and Environmental Research Alliance has been a true asset to the petroleum and gas

sector. Its research is of the highest standard and provides invaluable insight and transparency about the sector's operations to the public (e.g. inquiry into hydraulic fracturing).

However, QRC is concerned about the crowded and complex nature of the land access space in Queensland. Currently there are several statutory bodies with various roles in land access and different avenues where land holders and companies can raise land access issues. This is one area where roles and responsibilities could be streamlined to reduce the complexity of the process. Further details are provided in Section 2C of QRC's Streamlining Report.

QRC provides the following comments about the role of independent institutions and what is required to ensure they play an effective educational role:

- Their role and responsibilities must be clear and transparent;
- Their role must reflect a need of industry and/or the community (ensuring not to duplicate other institutions work); and
- Have clear performance indicators to measure effectiveness.

2.1.2. Information requests

IR 4.1, Impediments to investment created by licensing

The tenure and environmental licensing frameworks in Queensland are complex. However, there are areas for improvement, and in many instances, it comes down to ensuring the licensing frameworks are practical for the way the resources sector operates. QRC suggests the Commission refer to Chapter 1 of the Streamlining Report on areas for improvement.

2.2. MANAGING RESOURCES ACTIVITIES ON PRIVATE LANDS

2.2.1. Draft findings

DF 5.1, Landholder and resource rights

QRC agrees with DF 5.1 in that the Crown grants permission for a company to exploit the resource on its behalf. Land access is a contentious issue but there is adequate provision in Queensland legislation to ensure that there is balance between the rights of landholders and resource companies while maintaining consistency with Crown ownership of resources. Having said that, there are some improvements that could be made to the dispute resolution process, including clear timeframes at every step of the process. QRC made several land access recommendations in the recently released Streamlining Report.

DF 5.2, Land access negotiations

QRC agrees that landholders may enter into negotiations with little professional experience, but the existing Queensland regulatory system is robust and addresses the information asymmetry between inexperienced landholders and resource companies. The Land Access Framework provides guidance for landholders and stages in the statutory negotiation process are designed to resolve disputes should they arise.

The difficulty with the Queensland's current process is that it does little to incentivise both sides to reach agreement in a timely manner. QRC is aware of several scenarios where legal professionals have led the land access negotiations on behalf of the landholder with a tactic to delay the process. This is made possible because of a few areas in the process where no statutory timeframe is applied. It has been shown to over-correct the power imbalance so far that the landholder (and their lawyer) have little incentive to reach an agreement in a timely manner.

2.2.2. *Draft leading practices*

DLP 5.1, Strategic land use frameworks

QRC supports DLP 5.1 that blanket prohibitions on resources activity on agricultural land but cautions against over reliance on strategic land use frameworks in general. The draft DLP cites the COAG Energy Council *Multiple Land Use Framework* as leading practice. While this document sets out a series of general principles, these are expressed so broadly that they are open to a wide range of interpretations by individual State and Territory Governments. Also, there is nothing in the COAG principles that prevents such 'strategic' decisions from being devolved too far in relation to very large-scale projects, which require a high degree of expert technical assessment (e.g. large-scale renewable energy projects assessed at the Local Government level).

QRC supports the concerns raised in the Draft Report[2] regarding:

- Queensland's broad prohibitions on resources development within certain mapped areas under the *Regional Planning Interests Act 2014* without regard to the individual risks and merits; and
- The degree of duplication of process between the normal Environmental Impact Statement process for a resources project and the Regional Interests Development Approval application process.

It is critical that any strategic mapping framework and individual projects be subject to merits review.

Another consideration, as raised in the Interim Report, is regional planning to manage competing land uses with respect to the protection, conservation and restoration of biodiversity. The Independent Reviewer proposes that these plans would be ideally developed by the Commonwealth Government in conjunction with States and Territories.

QRC supports an integrated approach to strategic regional land use planning. QRC has experienced circumstances where conflicting interests within the Queensland Government has created misalignment between land released for exploration and development and environmental protections. The addition of the Commonwealth's views overlaying or creating conflicts will not deliver a sound outcome. The most recent example is the Commonwealth Government announcement of the expansion of the Exploring for the Future Program to a new resource potential corridor through western Queensland[3]. This eastern corridor conflicts with Queensland Government regional planning Strategic Environmental Area protections.

DLP 5.2, Land access notification

Where planned activity will be low impact, DLP 5.2 states that requiring early personal engagement between resources companies and landholders can ease potential tensions and be less costly than a negotiated agreement. It refers to the Queensland Land Access Code's notification requirements as a leading-practice example of this approach.

QRC clarifies that the notification requirements in the Land Access Framework act as a trigger to the formal negotiation process between a landholder and resource company, yet it is rarely the first meeting relating to access. Leading practice engagement is well before the formal notification is triggered whereby the landholder and resource company discuss the project and

[2] Draft Report, page 127
[3] Geoscience Australia (11 August 2020) '*Exploring for the Future expands across Australia*'. Accessed at https://www.ga.gov.au/news-events/news/latest-news/exploring-for-the-future-expands-across-australia

access arrangements, such as access times and locations, and potentially initial impacts to the landholder.

DLP 5.3, Land access agreements

While Queensland's Land Access Code may be superior to the frameworks in other States, it is not perfect. Chapter 2 of QRC's Streamlining Report addresses a series of procedural difficulties arising from Queensland's current system of land access.

DLP 5.4, Dispute resolution

While QRC supports in principle the need for dispute resolution methods that are designed to reduce tensions between landholders and resources companies, this does not necessarily mean that Queensland's Land Access Ombudsman entirely fills this scope given that the role involves only a limited jurisdiction. This role only deals with issues between landholders and the resources sector where there is already an agreement in place. For disputes which arise during the negotiation process, the alternative dispute panel of the Land Court provides arbitration.

As outlined in relation to DLP 5.1, Queensland would benefit from a review of the relevant land access bodies that play a role in dispute resolution with the aim to streamline roles and resources.

2.3. ADDRESSING UNNECESSARY REGULATORY BURDENS

2.3.1. Draft findings

DF 6.3, Triggering the EPBC Act (Water trigger)

QRC supports DF 6.3 whereby "*The evidence that the water trigger filled a significant regulatory gap is not compelling*". However, QRC recommends that the accompanying commentary be expanded, particularly with respect to duplication that the trigger creates between already robust State/Territory processes and that of the Commonwealth.

The Joint Industry Submission to the EPBC Act review states:

> *"The water trigger was introduced to the EPBC Act in 2013 despite state governments having constitutional responsibility for water and comprehensive existing state and territory regulation of water.*
>
> *With the exception of nuclear actions, the EPBC water trigger is unlike other MNES as it focuses on a type of activity and not an environmental value. As a result, an activity could have a similar impact on a water resource, yet be excluded on the basis of the action undertaken.*
>
> *Through the trigger, the Commonwealth Minister for the Environment needs to approve actions in relation to coal seam gas and large coal mining development that may have a significant impact on a water resource. In this respect, the Commonwealth can provide comment, request information and set conditions as part of the project approval, additional to state/territory processes.*
>
> *Proponents need to undertake significant duplicated effort to fulfil the prescribed administrative scope under Commonwealth and state/territory requirements, even though the environmental matter assessed is identical or very similar, and both assessments rely upon the same Independent Expert Scientific Committee (IESC) advice. This results in duplication of management plans which manage the same risks but have been subject to different requirements due to inconsistent expectations between the jurisdictions.*
>
> *Furthermore, the trigger is poorly defined in capturing all coal seam gas and coal mining projects regardless of size and has also resulted in the Commonwealth's regulation of*

matters that are not MNES. Interpretation and application of the trigger is further confused when having regard to other sources, including:

- *The related definition of a 'water resource' under the Water Act 2007 (Water Act), which requires that ecosystems contribute to the physical state and environmental value of the water resource for consideration as MNES*
- *The Significant Impact Guidelines, 1.3 Coal seam gas and large coal mining developments – impacts on water resources which effectively extends the definition of water resource to components of the ecosystem that do not necessarily contribute to the environmental value of a water resource – despite the requirement in the Water Act – such as terrestrial groundwater-dependent ecosystems and industries extracting groundwater for commercial use*
- *Should regulator officers interpret 'any vegetation that uses groundwater' to be part of the nationally significant water resource, all vegetation including invasive species may be considered a 'user of water'…*

Box 4: Duplication of the water trigger with state/territory processes [Example]...

In 2009, Dr Allan Hawke reviewed the EPBC Act and stated that:

> *Water extraction or use as a matter of NES under the Act is not the best mechanism for effectively managing water resources. The size of water resources and catchment areas, the scale of existing and predicted future pressures on these resources, and the environmental flow requirements of these resources vary dramatically across Australia. As with setting a threshold for a land clearance trigger, setting a threshold for a nationally significant level of extraction would be very difficult. Even if this threshold were determined, it would be almost impossible to accurately predict whether a particular water extraction pursuant to a water access entitlement would have a significant impact on the water resource over the longer term.*[32]

In 2013, following the introduction of the water trigger, the PC stated that the amendment:

> *Imposes an extra layer of regulation on affected proponents [in a situation where] it is not obvious that existing laws are deficient or that the particular legislative amendment adopted by the Australian Government is the best approach to deal with any identified gap in the regulatory framework.*[33]

Additionally, the Independent Review of the Water Trigger Legislation completed in 2017 found that despite a regulatory burden to industry of $46.8 million per year, there was no evidence the trigger had achieved its aims.[34]

In response to the Independent Review of the Water Trigger Legislation and its finding that the 'the water trigger is an appropriate measure to address the regulatory gap that was identified at the time of its enactment', the PC reiterated in 2020 that:

> *There is not strong evidence that the water trigger has filled a significant regulatory gap, but it has imposed considerable duplicated effort.*[35]

Given the evidence above, the MCA contends the water trigger remains unnecessary and should be removed from the EPBC Act"[4].

[4] Minerals Council of Australia, Queensland Resources Council, Chamber of Minerals and Energy of Western Australia, New South Wales Minerals Council and South Australian Chamber of Mines and Energy (2020) *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, page 28-30

The Independent Reviewer responded with the view that, despite recognising insufficiencies in the water trigger, duplication and the responsibility of the states and territories to manage their water resources[5], the water trigger be retained but modified:

- *"The trigger should be limited to consideration of any project that risks irreversible depletion or contamination of cross-border water resources only. The argument that the trigger not be limited to large coal and coal seam gas projects is compelling, but any potential expansion of scope would require careful consideration to avoid duplication with other Commonwealth and state and territory regulatory requirements.*
- *If state and territory laws meet Commonwealth Standards, then they should be able to be accredited.*
- *The National Environment Standard for MNES should explicitly define key terms, including a cross-border water resource and irreversible depletion or contamination of the resource.*
- *If the water trigger is changed, the name and remit of the IESC should be adjusted to reflect any altered focus. The Commonwealth Environment Minister (or devolved decision-maker) must seek the advice of this Committee when considering a proposal against the National Environmental Standard. The expertise and advice of the Committee should also be available to the states and territories at their request, subject to the capacity and priorities of the Committee"*[6].

QRC remains of the view that the water trigger should be removed. Based on DF 6.5 and the Joint Industry Submission, QRC recommends that the Productivity Commission consider a Draft Recommendation to remove the water trigger.

However, if the role for the Commonwealth is maintained, this should only focus on strategic approaches to water management. It should be consistent with the leading practice model of the Queensland petroleum and gas sector through its Joint Industry Framework for the management of cumulative impacts to groundwater resources and resulting risks to Matters on National Environmental Significance (MNES) in the Surat Basin caused by coal seam gas developments. Developed in conjunction with the Queensland and Commonwealth governments, the Framework aims to deliver reforms to ensure that EPBC Act approvals are:

- Fully aligned with Queensland Government-led modelling funded by proponents;
- Generally standardised, particularly with respect to model conditions and compliance; and
- Issued faster (decoupling assessment timeframes from that of the state).

QRC's Streamlining Report similarly seeks to establish an agreement with the Commonwealth Government to recognise models and assessments developed by Queensland's Office of Groundwater Impact Assessment and adopted by the sector for approvals[7].

DF 6.7, Third-party opponents

QRC recognises that legitimate aggrieved parties need to have their rights protected in relation to resource projects. QRC does, however, have concerns about the definition of 'third-party' as referenced in DF 6.7, which in some cases goes beyond parties who will be directly impacted by any decisions. For example, objections were lodged against the Adani Carmichael coal mine

[5] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 47, 50-51
[6] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 51
[7] Queensland Resources Council (2020) *Streamlining Report*, page 37

by a non-government organisation based in Brisbane and another based in India. Broad parameters around who constitutes a third-party contribute to lengthy delays in the approvals process.

The Productivity Commission may wish to consider the recommendation by the Senate Select Committee on Red Tape that the Australian Government reintroduce legislation to repeal Section 487 of the EPBC Act, together with the supporting information relied on by the Senate Committee in that regard. Similarly, at state and territory levels, the legitimate expectations of landholders and adjoining landholders to be heard does not necessarily mean that foreign third parties with no local interests should be able to delay and frustrate Australian decisions.

2.3.2. Draft leading practices

DLP 6.1, Risk based approach

QRC strongly supports adoption of a risk-based approach, and generally the means to achieving this, as described in DLP 6.1. However, despite guidance material[8,9] aligning with the concept as suggested in the Draft Report, the Queensland (and Commonwealth) Government's delivery of a risk-based approach is not always successful.

In June 2020, the Auditor-General reported that the Commonwealth Department of Agriculture, Water and the Environment (AWE) has not established a risk-based approach to its regulation, implemented effective oversight arrangements, or established appropriate performance measures[10]. Departmental documentation does not demonstrate that conditions of approval are aligned with risk to the environment[11].

It takes more than just general guidance, and as outlined in the Draft Report:

> *"The realisation and success of risk-based EIA depends on a number of factors. It requires: regulation that does not preclude the approach; clear understanding of the regulation's objectives; clear policies, processes and criteria by which regulatory decisions are made (and information on which to base them); and regulators with sufficient expertise"*[12].

QRC agrees that the following steps can aid in shifting to a risk-based approach and provide greater certainty:

- *"First, regulators can assign different projects to different 'assessment tracks' (for example, assessment on referral information or assessment using an environmental impact statement)… Second, the scope of assessments can be tailored so that they focus on more likely or harmful risks. Appropriate scoping can lead to an EIA process that costs less and counts for more in decision making (Canter and Clark 1995, p. 31)"*[13].
- *"A straightforward way to develop EIAs that are proportionate and targeted is to invest greater effort in the scoping stage"*[14].

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[8] Draft Report, page 156

[9] State of Queensland, Department of Environment and Science (2019) *Guideline: The environmental impact statement process for resource projects under the Environmental Protection Act 1994*

[10] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, page 8

[11] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, page 10

[12] Draft Report, page 157

[13] Draft Report, page 156

[14] Draft Report, page 157

As outlined in the Joint Industry Submission to the EPBC Act review, and consistent with the above, QRC and its kindred bodies recommended that:

- *"EIA processes should be supported by a comprehensive risk-based scoping stage that maps out exact information requirements and acceptable methodologies, locking in these requirements at the outset of the project and avoiding changes during the assessment.*
- *Assessment pathways, including referrals and EIA processes should be informed by risk, providing simpler rapid pathways for low-risk, well understood activities and environments…"*[15].

QRC's Streamlining Report reflects similar views on the shift to early scoping in the context of joint engagement between the Queensland and Commonwealth Governments and aligning expectations[16].

The Submission adds that the EPBC Act should adopt a risk-based approach to assessment pathways and scope, including:

- *"More detailed referral guidance, including industry-specific guidance that accounts for a range of existing land use and regional contexts*
- *A tiered approach to assessment and approval pathways based on an understanding of the activity and the environment in which it takes place, including whether current management and regulatory arrangements are adequate*
- *A more detailed assessment scope that focuses on the most significant risks and sets out information requirements, data standards and acceptable methodologies*
- *A framework to support risk-based condition setting, including model conditions for low risk or well understood activities/environments and tailored conditions for any complex or site-specific risks, or where understanding is less mature"*[17].

Through the proposed National Environmental Standards, the Independent Reviewer is of the view that there should be the capacity to automate consideration and approval of low-risk proposals[18]. Lower-risk projects that still require assessment could receive approval with standard conditions, which would provide proponents with greater certainty[19]. The Independent Review also has identified the need to invest in appropriate systems and tools to effectively deliver monitoring and risk-based compliance[20].

QRC recommends that accompanying commentary to DLP 6.1 recognise aligned views of the Joint Industry Submission (including as follows) and the Interim Report, and consider particular areas where risk-based approaches should be formally adopted:

- *"Water resource assessments: the water trigger assessment process through the IESC is exhaustive, expensive and time consuming; this is appropriate in areas or projects of high risk of water resource impacts. However, many projects that are required to go through*

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[15] Minerals Council of Australia, Queensland Resources Council, Chamber of Minerals and Energy of Western Australia, New South Wales Minerals Council and South Australian Chamber of Mines and Energy (2020) *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, page 33

[16] Queensland Resources Council (2020) *Streamlining Report*, page 35

[17] Minerals Council of Australia, Queensland Resources Council, Chamber of Minerals and Energy of Western Australia, New South Wales Minerals Council and South Australian Chamber of Mines and Energy (2020) *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, page 34

[18] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 1

[19] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 61

[20] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 97

the process are brownfield, located on existing sites with known and well-managed water plans and regulation. Many of these assessments result in no material change to water impacts or management arrangements. Often conditions simply add additional reporting burden or have no water-related conditions imposed.

- *A better risk-based adaptive management approach that looks at the context of the project, potential impacts, existing controls and probability of third party user impacts could be applied without the need for the extensive data-heavy IESC process.*
- *Brownfield projects: a risk-based approach could be adopted on existing sites where MNES values and impacts are well understood. Instead of a lengthy assessment process a set of model conditions could be applied that stipulate mitigation, management and offset requirements. The assessment could focus on whether the model conditions are adequate to address likely impacts based on a risk assessment and provide for a non-significant approvals process.*
- *Greenfield/full EIA situations: even in situations where a full EIA is needed, the focus should be on the assessment of key risks to MNES with other matters addressed through model conditions.*

One hurdle to the application of a risk-based approach and the better use of shorter assessment/approval pathways such as 'particular manner' decisions is the inability to consider offsets at the referral stage of a project. This interpretation appears inconsistent given that measures that minimise or reduce impacts can be considered. In considering risk-based approaches, 'particular manner' decisions are a significantly under-used existing pathway. 'Particular manner' provisions can reduce the number of controlled action assessments required. This rapid approval pathway would encourage projects to be designed to 'avoid or adequately mitigate impacts'.

Changes should also be made that recognise offsets as a form of mitigation and compensation at the referral stage, and as part of the risk-based approach…

A set of model conditions could be developed that can be applied as a 'particular manner' or a standard approval – either in whole or in part.

Integrating lessons and improvements in regulatory controls in the management of risks can be used to avoid the need for future projects to repeat the experience of current project proponents, whereby lengthy assessment processes lead to a known and expected outcome"[21].

<u>*Scoping timeframes*</u>

While QRC supports reasonable timeframes to facilitate scoping for environmental assessments, the 180-day timeframe associated with the Canadian planning phase[22] is excessive and can add to the already long project schedules. Rather than substantially increase current timeframes, such as the 20 business days for deciding the terms of reference at the Commonwealth level, the following steps could be taken:

- Sufficient guidance to ensure that referrals contain all the information needed for the Commonwealth to decide terms of reference (as above);

[21] Minerals Council of Australia, Queensland Resources Council, Chamber of Minerals and Energy of Western Australia, New South Wales Minerals Council and South Australian Chamber of Mines and Energy (2020) *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, page 36-37

[22] Draft Report, page 158

- A draft terms of reference document be submitted by the proponent, together with brief reasons why particular parameters are included or not included (e.g., reference to prior studies which do not need to be duplicated);
- Terms of reference for a technical matter, such as the existence or otherwise of a threatened species, should be a matter for experts and should not require subjective input from another layer of community engagement; and
- If the referral fails to include the required information specified in the guidance material, then this could be added to the terms of reference, which would incentivise high quality referrals.

DLP 6.3, Stop-the-clock provisions

QRC supports DLP 6.3 in limiting the use of stop-the-clock provisions. The Joint Industry Submission to the EPBC Act review also aligns with this view. The Submission further outlines other safeguards against potentially unnecessary additional information requests and use of stop-the-clock provisions, which could be considered leading practice:

- *"Proponents should have the ability to contest the validity of information requests. One example of how this can be enacted is section 146 of the Environmental Protection Act 1994 (Qld) which is applicable if certain types of applications have been lodged. This gives the applicant the right to refuse to respond to an information request in full or in part. The government then has to make a decision to assess the application on the information provided or declare that the information not provided was critical. The applicant can either accept the decision of the regulator or alternatively proceed with litigation. The ability to decline to answer irrelevant or immaterial information requests would assist in ensuring only essential information is requested.*
- *Only permitting one information request to be issued by the responsible agency, rather than multiple supplementary requests.*
- *Specifying a timeframe for the responsible agency to provide its information request, which should be an earlier time than the total period allowed for assessing the application. Section 89 of the EPBC Act sets out no timeframe. The only limitation is the total period allowed for deciding the assessment approach under section 88, which means the information request can be deferred until the penultimate day and then the clock is stopped. In this regard, the timeframe should not be too short to enable the agency to review the application properly, but should not be open-ended".*

QRC recommends that DLP 6.3 and accompanying commentary recognise the above practices.

DLP 6.4, Deemed decisions

DLP 6.4 proposes the use of deemed decisions as leading practice when assessment agency decisions are not made within statutory timeframes. QRC is of the view that deemed decisions can contribute to reducing delays in relation to relatively minor 'standard' activities where the requirements are able to be codified.

For non-resources developments, Queensland already has a framework for deemed approvals, currently in Section 64 of the *Planning Act 2016*. The deemed approval framework is only available in respect of code assessable applications, not impact assessable applications. It is only available if no variation is requested in respect of the normal code requirements. This is because the framework only makes sense if there are automatic conditions (the code requirements) that are available and not where judgment calls are required in order to override code requirements.

The Queensland example has the advantage that deemed approvals are not automatic and only arise if a notice is given to the local government by the applicant. This means that, if the applicant wishes to continue negotiations with the local government voluntarily over an extended period, nothing prevents that process from continuing.

However, deemed approvals are not without risks to the proponent. There is also potential for the framework to lead to perverse consequences in the way the regulator tries to minimise its risks. For example, if an under-resourced regulator sees the risk of deemed approvals as a threat, an obvious way to minimise the risk would be to create default standard conditions or code requirements that a proponent would not wish to be imposed, so as to discourage proponents from using the deemed approvals provisions. There have also been Queensland examples where the deemed approval process has led to even longer delays than if the application had been addressed in the normal way[23].

While DLP 6.4 has some benefits, QRC would suggest focusing efforts on actions in **Section 2.3.2** associated with DLP 6.1.

DLP 6.7 – 6.8, Outcomes-based and standard conditions

Outcomes-based conditioning

QRC strongly supports outcomes-based conditioning as described in DLP 6.7. While the Commonwealth's *Outcomes-based conditions policy – EPBC Act* aligns with this leading practice approach, the Commonwealth Government's delivery of outcomes-based conditioning is not always successful.

The Auditor-General reported that AWE is unable to demonstrate that conditions of approval are appropriate[24]. Departmental documentation did not demonstrate that conditions of approval aligned with risk to the environment and with respect to achieving the intended environmental outcome[25].

The Auditor-General highlighted that AWE's internal guidance requires conditions to be developed where they are necessary to reach the desired outcomes. Despite this requirement, it was found that the Department does not consistently record desired environmental outcomes and how the conditions meet them. Without documentation of the desired environmental outcomes, the Department is unable to provide assurance that conditions are proportionate to the level of environment risk[26].

As outlined below in DLP 6.9 – 6.10, *Post-approvals*, the prevalence of 'nested approvals' requiring prescriptive plans has increased in recent years and contradicts outcomes-based conditioning. Whenever these highly prescriptive plans need to be updated, there is a prescriptive variation process involving an assessment whether there is any additional increased impact at all as a result of the proposed revised management measures.

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[23] An example was a highrise development at Bargara, when the Bundaberg Regional Council deliberately allowed the application to progress to deemed approval in order to avoid making a controversial decision, with the consequence that the State Planning Minister then had to 'call-in' the application for a revised decision, some 4 months later, on the basis that 'the Council had not given it consideration in accordance with proper planning process, and…may have potentially overlooked their responsibility to ensure transparent and robust planning decisions: https://www.news-mail.com.au/news/breaking-minister-reveals-bargara-high-rise-decisi/3576314/

[24] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, page 8

[25] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, page 10

[26] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, page 61

Standard conditions

QRC supports DLP 6.8 with respect to the use of standard conditions for standard risks, such as Queensland's leading practice model conditions for mining and petroleum and gas. However, with the recent introduction of Queensland's new Progressive Rehabilitation and Closure Plan (PRCP) framework for mining, and implementation predominantly by means of the statutory *Guideline – Progressive Rehabilitation and Closure Plans*[27] (PRCP Guideline), has caused a shift back to prescription. Mines will need to transition existing outcomes-based model conditions for rehabilitation matters from an Environmental Authority (EA) to the meet the requirements for a PRCP.

During the development of the PRCP Guideline, QRC raised major concerns that the information requirements were overly prescriptive, and in some cases excessive. The Guideline took everything that might be done throughout the life of a mine to achieve rehabilitation and compressed it all into a detailed design that is expected ahead of mining commencing. The Guideline mandates or sets an expectation that information is provided in a specific form or by means of a particular method. In some cases, this can create additional cost, processes and long-lead times, which may not add any greater value or deliver a different or better outcome than that of an alternative approach.

QRC sought to streamline and focus information requirements on matters that materially affected the proposed land outcome at surrender. However, the Queensland Department of Environment and Science (DES) maintained a risk-averse position and the PRCP Guideline was finalised with the prescriptive information requirements.

While the Draft Report commends Queensland's model conditions, it should not endorse the conditioning and prescriptive requirements of the PRCP framework.

DLP 6.9 – 6.10, Post-approvals

QRC supports DLP 6.9 and 6.10 with respect to the need for statutory timeframes and clear guidance for post-approvals. However, QRC is of the view that further action needs to be undertaken in this space.

The Joint Industry Submission to the EPBC Act review delves further into post-approvals issues being experienced by the resources sector, including complications created by nested approvals and difficulties in varying an approval, and the provides solutions to improve current practices. The Submission states:

> "***8.1. Improved post-approval processes***
>
> *Many aspects of the approval process are undertaken following the primary approval (e.g. offsets determinations, approval of management plans etc.). This places time pressure on proponents as these 'nested approvals' are critical for project commencement.*
>
> *There is a significant reliance on additional plans rather than a focus on outcomes and the specific measures needed to manage impacts. There have also been instances where proponents have been required to develop separate management plans for the same matter and undergo two separate approval processes for the Commonwealth and state or territory despite being almost identical.*

[27] State of Queensland, Department of Environment and Science (2019) *Guideline – Progressive Rehabilitation and Closure Plans*

For many of these 'nested' approvals, there are two significant risks:

- *The matter that has been deferred for future consideration may be fundamental both to the approval and to the proponent's investment decision, in which case it is a matter that should have been decided upfront*
- *There is no assessment framework for the post-approval plan or report, such as regulatory timeframes, criteria or appeal against refusal. There may be multiple information requests, with no way of closing out the process, preventing the operation (or construction) from starting.*

A significant complication is that the assessment of a plan is often undertaken by assessment officers who are unfamiliar with the project and the primary assessment process, requiring re-learning and re-assessment of the project's impacts as if from scratch. The primary and post-approval branches of the regulator can also interpret key components of an approval differently, creating uncertainty for the proponent…

Guidelines detailing opportunities to deal with many of these matters during the assessment phase could generate significant efficiencies for some projects.

Approval conditions set for the development of management plans (in the post-approval stage) should allow for a focus on the desired outcome rather than the detailed means by which a proponent may deliver the outcome – the difference between prescriptive action-based and outcome-based conditioning.

For those technical matters of detail that can be addressed by post-approval plans or reports, a set of development assessment rules should set out procedures, timeframes and internal review rights. If the subject matter is standard, then benchmark criteria should also be included.

Alignment of Commonwealth and state/territory requirements for management plans would also be a significant improvement to the post-approval process. Even when Commonwealth and state/territory governments agree to the development of a single management plan to satisfy both jurisdictions' requirements, proponents have sometimes experienced a joint review process that is disjointed and poorly coordinated by agencies, both in timing and content. This complex approach can add significant delays to the planning process…

8.2. Improved variation pathways

Post-approval processes should be more flexible to allow changes and variations to projects and approval conditions. In particular, provisions of the Act that allow for variation of existing approvals could include flexible pathways to more appropriately consider minor or material changes based on their level of risk.

A simplified and rapid process should be made available to proponents to assess the proposed change and modify the primary approval without the need for a full referral and assessment process where changes are not significant.[47]

This would enable projects to adapt, improve and respond to evolving circumstances while maintaining the environmental outcomes sought by the approval.

By their nature, mining operations and plans alter frequently. Whether driven by market forces, geology, access or climate (e.g. high rainfall and flood events) the specifics of a project can change unexpectedly.

Often the rate of production, footprint or need for supplementary infrastructure (e.g. roads, dams etc.) can evolve over time. These changes may be outside the referred

footprint or differ from the project description that was assessed and approved. These projects are also often long-lived (multi-decade) with ongoing operations requiring additional exploration and brownfields expansions. Despite this, the underlying nature of the operation and its associated environmental considerations are typically common to the original proposal.

Many EPBC Act variation assessments for mining projects are limited to impacts on MNES, Threatened Ecological Communities and species habitats, and in coal mining and coal seam gas cases, the water trigger. The associated issues are not new or particularly complex and are unlikely to require detailed study.

In situations where the changes result in only minor impacts to MNES the post-approval variation process should address these as minor amendments, potentially through a simple process that confirms that existing management measures will apply and where relevant additional offsets based on previous calculations will be secured.

Where more significant changes are proposed, a rapid assessment process could determine if changes will result in materially different impacts to those originally assessed (e.g. whether additional MNES are likely to be impacted that were not considered in the initial assessment).

A variation to the approval should be possible in situations where changes are determined not to be material. This would enable expansions to be considered without the need for a second full referral and assessment process.

Variations to approvals should also be issued as a consolidated approval, making it simpler for the operator and regulator to administer and track the conditions"[28].

The Draft Report should recognise the above comments and recommendations from the Joint Industry Submission.

2.3.3. Draft recommendations

DR 6.1 and 6.2, Bilateral arrangements

QRC is supportive of DR 6.1 and DR 6.2 in that the EPBC Act should be amended to enable negotiation of bilateral approval agreements and address inconsistencies and overlap in project approval conditions.

However, with the release of the Interim Report, the Independent Reviewer expressed the view that there may be significant shortcomings in the current bilateral arrangements and instead proposed enforceable National Environmental Standards to set the foundations for effective regulation and ensure that decisions made under the EPBC Act clearly track towards Ecologically Sustainable Development. Through these Standards, the Independent Reviewer seeks to provide a pathway for the Commonwealth to recognise and accredit the regulatory processes of states and territories and hence support greater devolution in decision-making.

The Independent Reviewer recommended that the National Environmental Standards should:

- Be binding and enforceable regulations through a formal process set out in the EPBC Act;
- Prescribe how decisions made contribute to outcomes for the environment and include important processes for sound and efficient decision-making; and

[28] Minerals Council of Australia, Queensland Resources Council, Chamber of Minerals and Energy of Western Australia, New South Wales Minerals Council and South Australian Chamber of Mines and Energy (2020) *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, page 42-44

- Be concise, specific and focused on outcomes but not be highly prescriptive[29].

Prototype Standards have been included in the Interim Report to guide the next steps in reform development. However, the Independent Reviewer recognises that the prototypes are only a starting point and further work, including consultation with experts and stakeholders, is needed to ensure the Standards address key threats to MNES and strikes the right balance to enable Ecologically Sustainable Development[30].

On 20 July 2020, in response to the Interim Report, the Commonwealth Government committed to:

- "*Develop Commonwealth led national environmental standards which will underpin new bilateral agreements with State Governments*"; and
- "*Commence discussions with willing states to enter agreements for single touch approvals (removing duplication by accrediting states to carry out environmental assessments and approvals on the Commonwealth's behalf)*"[31].

Given the Government has already committed to integrate the existing bilateral mechanism with the new National Environmental Standards, it would be appropriate to progress DR6.1 and 6.2 in line with the above commitments.

2.3.4. Other

Section 6.4, Review mechanisms

The Draft Report appears to accept criticism of the Queensland Coordinator-General's powers. There has been a long-standing bipartisan approach in Queensland that the role of the Coordinator-General is not merely an administrative public service role, but rather, it is representative of 'whole-of-government'. It involves a weighing up or balancing of a range of matters, including decisions to allocate State land or other State resources.

2.4. DELIVERING SOUND ENVIRONMENTAL AND SAFETY OUTCOMES

2.4.1. Draft findings

Section 7.2, Offsets

The Draft Report correctly states that "*The handling of the EPBC Act offsets policy is a source of frustration*" and that there are "*poor processes and a lack of transparency from the Australian Department of the Environment and Energy (now DAWE) in applying the EPBC Act offsets policy*"[32].

Detailed comments on administrative issues associated with the application of the offsets policy and calculator is provided in **Appendix A** of the Joint Industry Submission to the EPBC Act review. It includes several issues raised by QRC with the Commonwealth Government since 2017. This is supported by the findings of the Auditor-General:

> *"The department has not established internal guidance for reviewing environmental offsets beyond the offset policy and guide. Further guidance intended to be developed after the offset policy was established has not been completed. In addition, there is no quality assurance process for sampling or reviewing approved offset plans. Without these*

[29] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 3-5

[30] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*, Page 101-110

[31] Australian Government (20 July 2020) Media release from the Hon. Sussan Ley MP, Minister for the Environment, *Reform for Australia's environment laws*

[32] Draft Report, page 202

controls, the department lacks assurance that offsets are assessed consistently, in line with the offset policy and in a way that achieves the objectives of the EPBC Act"[33].

QRC is of the view that in order to drive meaningful changes to the administration of offsets, the Commonwealth Government must more generally (and as is a common set of themes throughout this submission and the Draft Report):

- Adopt a risk-based, outcomes-focused assessment and conditioning approach;
- Develop and publish better guidance to support policies, systems and tools relevant to applicable audiences; and
- Invest in its staff and improve its service delivery.

QRC recommends that the Productivity Commission have regard to, and reflect **Appendix A** of the Joint Industry Submission, in its final report.

Further details pertaining financial-based offsets and associated registers is provided in **Section 2.4.2** with respect to DLP 7.4 and 7.5.

Determining offsets

QRC agrees with the Draft Report that:

> *"Determining the baseline is not straightforward, and the assumptions made in predicting it are not always clearly spelled out in offset policy documentation"*[34].

However, QRC contends that the following extract has the potential to be misleading unless qualified:

> *"One study estimated that the baseline rates of vegetation loss implicitly assumed when calculating the benefits of land conservation for offsets was several times higher than recent observed rates of deforestation in some States (Maron et al. 2015). If the rates of loss assumed in offset determinations are as inaccurate as this suggests, a meaningful proportion of claimed offset benefits may be illusory"*[35].

Averting the loss of a protected matter or its habitat is considered to deliver a conservation gain where there is an immediate threat of destruction or degradation. The Risk of Loss (ROL) of that given site is averted by securing its future for conservation purposes (e.g. through a conservation covenant on the title of the land). In the Offsets assessment guide, considering future risks to a specific site in order to quantify averted loss is undertaken over either a 20-year timeframe or for the duration of the offset, whichever is the shorter period.

In determining ROL, a proponent can only submit a high ROL (e.g. 90%) if it is able to demonstrate that the land will be re-cleared and not return to a threatened ecological community or habitat in a 20-year period. This is generally confirmed by means of past landholder records, historic aerial imagery and site-specific and regional land use information, and landholder statements demonstrating intent to continue clearing into the foreseeable future.

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[33] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, page 65

[34] Draft Report, page 203

[35] Draft Report, page 203

Some material developed by academia[36], suggesting the ROL has been overestimated, relies on coarse, broad-scale spatial data for determining background rates of clearing. It does not capture site-specific and field validated vegetation coverage and clearing.

However, for many post-approval applications and preliminary documentation submitted since late 2017, the above site-specific information is being either disregarded or not well considered in the Commonwealth's assessment. Instead, the Commonwealth Department of Agriculture, Water and the Environment is proceeding with its own discretionary and risk-averse approach. Their position is that unless permanent removal of the habitat can be demonstrated (e.g. for infrastructure) a ROL of zero per cent will only be accepted for the respective offset area despite having all the above information to prove otherwise. This shift in interpretation and application remains unjustified and continues to impact on current applications and investments.

DF 7.3, 'Lack of' rehabilitation and abandoned mines

QRC does not support DF 7.3, which states:

> *"There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia — in part because rehabilitation and decommissioning only became a policy focus for governments in the latter half of the 20th century. As a result, there is a large number of legacy abandoned mines".*

QRC is concerned that this draft finding, and Section 7.3 of the Draft Report more generally, fails to include adequate context with respect to:

- The longevity of resource operations, despite referencing this elsewhere in the Draft Report[37];
- The way in which community expectations have changed;
- Misrepresentation of information and reporting related to disturbed land, rehabilitation and abandoned mines (see below).

QRC recommends that DF 7.3 be revised having regard to these factors (as is also elaborated further below).

<u>*Misrepresentation of information on disturbed land and rehabilitation*</u>

The Draft Report states that *"little rehabilitation has occurred in Australia"*[38] and specifically that:

> *"Areas being rehabilitated in Queensland are about 9 per cent of the disturbed mining area — and areas certified as rehabilitated represented less than 0.25 per cent of the area of land disturbed (QTC 2017, p. 34)"*[39].

These statements are misleading and do not reflect that progressive rehabilitation is undertaken in line with the scheduling of operations, which varies regularly in response to a dynamic market and customer product specifications. The ability for operations to be flexible to such changes, facilitates a competitive mining sector both within Australia and globally.

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[36] Maseyk, F., Evans, M., and Maron, M. (2017) *Guidance for deriving 'Risk of Loss' estimates when evaluating biodiversity offset proposals under the EPBC Act*
Maron, M., Bull, J., Evans, M. and Gordon, A. (2015) *Locking in loss: baselines of decline in Australian biodiversity offset policies, Biological Conservation*, vol. 192, pp. 504–12.

[37] Draft Report, page 209

[38] Draft Report, page 208

[39] Draft Report, page 208

Disturbed land can only be rehabilitated when it is no longer being actively used. For example, an overburden emplacement for a mining operation may not be available for rehabilitation until such time as the material ceases to be disposed of on the area or rehandled for the purpose of achieving the required landform design. Another example is that mines that take ash from adjacent coal-fired power stations have large areas set aside for future ash disposal. Therefore, these areas cannot be rehabilitated until the area is no longer required for ash disposal. In some cases, this can extend across decades.

For infrastructure or processing facilities that are required for the entirety of operations, rehabilitation cannot be undertaken until closure, and in some instances, such features (e.g. roads) will remain. In this regard, there are bound to be periods where the area of disturbed land is greater than land rehabilitated.

With respect to the above quote from the Queensland Treasury Corporation (QTC), QRC has consistently rejected this finding as any sort of meaningful measure. For certification to systematically occur, the Government has to openly encourage it and provide a simple and consistent process for doing so. This has only started to occur in the last three years, driven proactively by the resources sector.

As described further in **Section 2.4.2** on DLP 7.8 to 7.10, progressive certification is a unique system to Queensland. It allows for Government, who must be confident that relevant conditions have been complied with and rehabilitation has been completed satisfactorily, to sign off (or certify) an area prior to surrender; noting this area must be maintained through to surrender. However, certified land is not the same as progressive rehabilitation, which includes all steps in the lead up to achieving the relevant completion criteria (e.g. landform establishment, cover placement, revegetation). The two must be clearly distinguished to avoid misrepresenting the efforts of the resources sector.

In addition, seeking progressive certification is a voluntary assessment and approval process (see also section below on *DLP 7.8 – 7.10, Rehabilitation incentives and costs*). There are some companies that have not yet sought, or have chosen not to seek, certification. In any case, it does not mean that they have not undertaken progressive rehabilitation or failed to achieve the relevant completion criteria.

Misrepresentation of information on abandoned mines

The Productivity Commission's use of information from Unger et al. (2012) estimating that there could be more than 50,000 abandoned mine sites in Australia has been consistently challenged by the resources sector. Queensland is said to have a subset of 15,000 sites, but as clearly set out in the Department of Natural Resources, Mines and Energy's (DNRME) draft *Risk and Prioritisation Framework for Abandoned Mine Management and Remediation*[40] (draft Framework), only about 100 sites are actually of environmental or safety risk sufficient to warrant Government intervention.

The draft Framework notes that the vast majority of sites are:

> *"very small mines established in the 'gold rushes' of the late 1800s to early 1900s with unsophisticated methods and relatively minor ground disturbance. These sites lack characteristics of a larger contemporary mine and are collectively referred to as 'historical mining disturbances' that are managed through targeted (risk-based), low-cost remediation projects".*

[40] State of Queensland, Department of Natural Resources, Mines and Energy (2020) Draft Risk and Prioritisation Framework for Abandoned Mine Management and Remediation, Consultation Paper

QRC is pleased to see that the Productivity Commission has noted the difference between the above figures[41]. However, DF 7.3 could be interpreted in that abandonments continue to regularly occur, when this is far from the truth. The reality is that there has been, at most, one in Queensland in the last decade, and none since the commencement of the Financial Provisioning Scheme.

In moving forward, and seeking opportunities to improve the status of abandoned mines of significance, QRC strongly supports DLP 7.11 that:

> *"There is merit in governments working with industry to reopen and rehabilitate legacy abandoned mines, such as through streamlined approval processes (without compromising the intent of regulation) and indemnities against past damages".*

DF 7.5, Financial assurance

QRC would like to draw the Productivity Commission's attention to an error in the Draft Report where it is stated that:

> *"larger miners or higher-risk miners are excluded from the* [Queensland] *pool"*[42].

In fact, larger miners are not excluded from the pool, rather no one entity can have more than a $450,000,000 liability in the Scheme Fund with the remainder paid as a form of surety. As is correctly pointed out in the Draft Report it is important that such a threshold is set so as not to risk the integrity and sustainability of the Scheme Fund.

As such, QRC recommends that the Productivity Commission reconsider the drafting of DF 7.5.

2.4.2. Draft leading practices

DLP 7.4 – 7.5, Financial-based offsets and associated registers

QRC supports DLP 7.5 with respect to the pooling of funds into a financial-based offset mechanism. QRC is of the view that offsets can be maximised when funded and delivered collectively and achieve better environmental outcomes when set within a broader landscape restoration context alongside recovery plans and other strategic environmental investments.

As noted in the Draft Report, in Queensland, a proponent can choose to deliver an offset financially whether wholly or partially. While QRC supports this approach, there are opportunities for substantive improvement in the governance, structure and operation of Queensland's financial offsets.

In response to the *Review of Queensland's Environmental Offsets Framework Discussion Paper*[43], QRC raised the following concerns:

- The account type and set up is not appropriate for the purpose of delivering offsets. It Is not established as a trust and does not have the legal obligations and protections this provides. Further, the financial offset contributions are consolidated with other Department monies for other purposes;
- Any interest earnt on the Offset Account does not appear to be invested into offsets or directed to landholders;
- Implementation and use of the Account for delivering on-ground offsets, having regard to Government's limited governance arrangements and strategic planning, has been poor and lacks transparency.

[41] Draft Report, page 216

[42] Draft Report, page 213

[43] State of Queensland (2019) Review of Queensland's Environmental Offsets Framework Discussion Paper

As recommended in the Joint Industry Submission to the EPBC Act review:

> *"Key aspects of a financial-based offsets mechanism must include:*
>
> - *Funds should be hypothecated, independently administered and subject to best practice governance requirements*
> - *Subject to a transparent accountability and performance reporting regime (e.g. register of contributions and works, annual report on expenditure, works completed, rolling progress and how it is delivering on biodiversity outcomes) to ensure expenditure aligns with the mechanisms objectives and on-time and on-budget delivery.*
>
> *In designing and implementing the financial-based offsets mechanism, the governing body should consider:*
>
> - *Ensuring investment are strategic, complementing other Commonwealth, state and territory offset and conservation initiatives*
> - *Enabling contributions to be disseminated as grants to not-for-profit organisations with a track record in conservation such as Birdlife Australia, Bush Heritage, the Nature Conservancy, Greening Australia etc. particularly where these organisations work with local communities, land holders and Traditional Owners*
> - *Complementary opportunities for employment and stimulus in regional areas which may include supporting improved land management practices for land users in lieu of locking up land".*

DLP 7.5 recommends the Biodiversity Conservation Trust in New South Wales as a leading practice model. QRC supports the concept of the Trust as a separate entity with the capacity to be strategic about the location of offsets, and to utilise the funds to drive greater investment in conservation by private landholders. However, the extent to which this model is considered leading practice should be reviewed. Upon implementation of the Trust, QRC understands that there are barriers to the adoption and use of the Trust to deliver offsets, including:

- The pricing mechanism (Biodiversity Offsets Payment Calculator) for biodiversity credits produces unrealistic prices that are orders of magnitude higher than the cost of a proponent securing and managing an offset. This is driven by:
    - The limited data set used to model prices in the Calculator. It is not a good representation of the vast number of credits for which they are being used to predict prices; and
    - Prices fluctuating significantly over time. A final price of a payment to the Trust can only be calculated post approval. As well as the very high prices, this uncertainty makes it difficult to rely on the use of the Trust and drives mining proponents back to securing their own offsets.
- Limited ability for the Trust to deliver the type or scale of offsets required by the mining industry.

Having regard to the above, QRC welcomes the consideration of alternative models as leading practice, such as Reef Trust offsets. The Reef Trust is designed to allow for the consolidation of investment from a wide range of sources to deliver the greatest outcomes for the Great Barrier Reef. It is being delivered by the Commonwealth Government, in collaboration with the Queensland Government, and Great Barrier Reef Marine Park Authority. The Reef Trust has stringent financial, project management and reporting processes in place.

Consistent with DLP 7.4, QRC agrees with the use of public registers for the recording of offset obligations, particularly for financial offsets. As identified in the Draft Report, Queensland maintains an Offsets Register. Similar to the above, QRC believes that the availability and transparency of the information on the Register could be improved, consistent with that outlined in the Draft Report.

DLP 7.8 – 7.10, Rehabilitation incentives and costs

Rehabilitation incentives

Financial assurance arrangements to fulfil rehabilitation, in the event a company is unable to deliver on its obligations, is present in most (but not all) jurisdictions. While QRC supports financial assurance as a leading practice, it does not support the statement in:

- DLP 7.8 that "*financial assurance… provides incentives for companies to undertake rehabilitation*";
- DLP 7.9 that "*Rehabilitation bonds that cover the full cost of providing rehabilitation offer the highest level of financial assurance for governments, and provide companies with full incentives to complete rehabilitation in a timely way*"; and
- DLP 7.10 that "*Progressive rehabilitation can be encouraged by financial surety requirements being reduced commensurate with ongoing rehabilitation work*".

Similarly, the Queensland Government has also frequently suggested to QRC that Financial Provisioning (i.e. financial assurance) functions as an incentive – the more rehabilitation a company does, the less it pays because there is less rehabilitation to be covered in the calculated cost. This has the potential to mislead and give the impression that without a financial assurance no company would do any rehabilitation.

Further, the Draft Report states:

> *"if pooled approaches are not paired with other compliance and enforcement arrangements, the incentives to undertake rehabilitation will be diminished or non-existent"*[44].

In a time of ever-increasing community scrutiny on the resources sector, it is critical for a company's reputation and social licence to operate to meet rehabilitation expectations, including any agreed post-extraction land outcome that is safe, stable and non-polluting. The above statement is not helpful and could be adversely interpreted by the community. QRC recommends that it be removed from the Draft Report.

Genuine rehabilitation incentives should go above and beyond existing obligations tied to the actual cost of undertaking rehabilitation.

A leading practice example (although noting room for improvement) of an incentive is the voluntary Queensland progressive certification framework authorised under the *Environmental Protection Act 1994*. It allows for Government, who must be confident that relevant conditions have been complied with and rehabilitation has been completed satisfactorily, to sign off (or certify) an area prior to surrender. However, it is important to note that resource companies continue to remain responsible for the ongoing upkeep of certified areas until surrender.

Progressive certification provides the resources sector with regulatory certainty that rehabilitated areas will not be subject to future changes in requirements or expectations over time.

[44] Draft Report, page 214

Since early 2016, QRC and the resources sector has taken a proactive approach, through the testing of real rehabilitation case studies, to assist the State Government in determining how to best utilise and consistently implement the certification framework.

On 2 June 2017, Glencore's Newlands was the first open cut coal mine to receive certification for approximately 73 hectares of rehabilitation associated with part of an overburden emplacement area. This milestone provided a constructive way forward for both Government and the resources sector in encouraging further certification of progressive rehabilitation. While significant progress has been made, QRC is still seeking the development of operational guidance to support the legislative framework, set expectations on documentation to support an application and drive consistency in process.

From, and including, the time Newlands was granted progressive certification, QRC's member companies (predominantly associated with mining) have collectively had **3,021 hectares** certified to date by the Queensland Government. Further examples of progressively certified rehabilitated land is showcased on QRC's website.

In addition to progressive certification, and in response to the *Better Mine Rehabilitation for Queensland Discussion Paper*[45], QRC also proposed a number of incentives for companies who demonstrate good rehabilitation performance, including:

- Reduction in fees for Environmentally Relevant Activities, tenure rent and Annual Returns. For tenure rent:
    - Concession for area of tenure not disturbed, that is paying rent only on the area disturbed (used) not on the full tenure;
    - Concession for active rehabilitation, that is rehabilitation action implemented, however not proven successful or yet progressively certified; and
    - Concession for progressively certified rehabilitation.
- Access to future tenure areas for companies with demonstrated rehabilitation performance (although not at the risk of penalising new operators); and
- Grants for site-specific rehabilitation trials (e.g. reprocessing of waste materials).

QRC recommends that DLP 7.8 to 7.10 be amended to:

- Remove reference to financial assurance or rehabilitation bonds being an incentive to undertaking rehabilitation; and
- Recognise alternatives practices, beyond existing obligations that are tied to the cost of rehabilitation, which can deliver incentives for rehabilitation.

Estimation of rehabilitation costs

With respect to DLP 7.9, the Draft Report states:

> *"…recent reforms in several States have resulted in increases in rehabilitation bonds, or moves away from bonds to a pooled risk system. All jurisdictions that use rehabilitation bonds have a policy that they should cover the full rehabilitation liability. Nonetheless, risks remain — rehabilitation calculators used by governments, such as the one used in New South Wales, can often underestimate the liabilities, and bonds are usually not regularly updated to reflect the most up-to-date information"*[46].

[45] State of Queensland (2017) *Better Mine Rehabilitation for Queensland Discussion Paper*

[46] Draft Report, page 213

While the Draft Report makes reference to the recent reforms in Queensland, QRC would like to recognise the design of the new Financial Provisioning Scheme as an example of leading practice (and policy development). QRC commends the open, transparent and inclusive nature of Queensland Treasury's approach to consultation and development of the Scheme.

The Scheme contribution and associated Estimated Rehabilitation Cost (ERC) covers the full rehabilitation liability consistent with the extent and risk of disturbance identified iteratively during operations. Although the ERC is determined by means of a Government-development calculator, it is to be reviewed routinely (at a minimum every two years). Further, a company can only hold an ERC decision for a maximum of five years pending no change in disturbance and rehabilitation liability from activities.

2.4.3. Information requests

IR 7.1, Deficiencies in compliance and enforcement

The Draft Report seeks evidence of any systematic deficiencies in the compliance monitoring and enforcement effort of regulators overseeing resources projects. In response to IR 7.1, QRC directs the Productivity Commission to the findings of:

- The Queensland Audit Office report on *Managing coal seam gas activities*[47]; and
- The Auditor-General report on *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*[48]; and
- The Interim Report[49].

Managing coal seam gas activities

The Queensland Audit Office found deficiencies in the compliance monitoring processes of regulators overseeing coal seam gas projects. The findings and recommendations are relevant to improving the compliance effort of regulators across the resources sector.

The regulators, and divisions within them, adopt different approaches to compliance and monitoring. Each relevant unit within DNRME develops its own compliance plans and actions using recording systems which are not linked. DNRME and DES record compliance outcomes in different databases and have limited data sharing capabilities. The report noted this inhibits the ability of regulators to provide a collective view of compliance across the sector and identify trends that may indicate broader compliance issues. The report also outlined that gaps in information sharing create unnecessary risk and uncertainty in compliance processes and outcomes.

The report found that regulators predominantly measure and report on compliance activities and status rather than outcomes; this approach does not represent effective risk-based regulation. DNRME does not monitor the number of operators found to be non-compliant who are brought back into compliance. DES does monitor this, but only on an aggregate level across all industries it regulates. Regulators' plans could be improved by detailing the intended outcomes and types of risks they aim to address rather than the activities undertaken – an outcomes-based framework.

[47] Queensland Audit Office (February 2020) *Managing coal seam gas activities*

[48] Auditor-General (2020) *Report No.47 2019–20, Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*

[49] Samuel, G. (June 2020) *Independent Review of the EPBC Act Interim Report*

QRC is supportive of the report recommendations made to DNRME and DES to facilitate effective compliance monitoring and enforcement from the two entities:

- Make better use of their data to effectively deliver regulatory outcomes by using insights from data analysis to inform their compliance planning and engagement across all areas of the department and improving their reporting to develop a collective understanding of industry compliance and regulatory outcomes; and
- Enhance coordination between the departments to assist in providing greater clarity for applicants and stakeholders on the progress of tenure and environmental authority application.

Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999

The Auditor-General found that, despite being subject to multiple reviews since commencement of the EPBC Act, AWE's administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective. The report is reflective of the experiences of the resources sector's dealings with the Department.

With respect of deficiencies in compliance (both internally and externally) and enforcement, the Auditor-General reported that:

- *"The department does not have an appropriate strategy to manage its compliance intelligence, limiting its access to the regulatory information necessary for complete and accurate compliance risk assessments. Key limitations include poor linkages between sources of regulatory information and a lack of formal relationships to receive external information;*
- *The regulatory approach to referrals, assessments and approvals has not been informed by an assessment of compliance risk. Strategic compliance risk assessments do not inform regulatory plans… The approach to individual referrals, assessments and approvals is not tailored to compliance risk;*
- *Systems and processes for referrals and assessments do not fully support the achievement of requirements under the EPBC Act. Procedural guidance does not fully represent the requirements of the EPBC Act and lacks appropriate arrangements for review and update;*
- *The absence of a quality assurance framework leaves the department without appropriate assurance over its regulation of referrals, assessments and approvals, including: compliance with the EPBC Act, quality and consistency of decision-making, and accuracy of externally-provided information;*
- *Compliance with statutory timeframes has decreased since the commencement of the EPBC Act… This decrease was most pronounced from 2014–15 to 2018–19, with the proportion of referral, assessment method and approval decisions made within statutory timeframes decreasing from 60 per cent in 2014–15 to five per cent in 2018–19. The average time taken for approval decisions increased from 19 days over the statutory timeframe in 2014–15 to 116 days over the statutory timeframe in 2018–19;*
- *Reporting on compliance with statutory decision-making timeframes is not consistent with the EPBC Act;*
- *The department is unable to demonstrate that conditions of approval are appropriate… Poorly written or non-compliant conditions may impact the ability of the condition to be monitored or protect matters of national environmental significance;*

- *The absence of effective monitoring, reporting and evaluation arrangements limit the department's ability to measure its contribution to the objectives of the EPBC Act;* and
- *The department does not monitor or report, internally or externally, on the effectiveness or efficiency of its regulation of referrals, assessments and approvals*".

Interim Report

The Independent Reviewer of the EPBC Act expressed that the culture of monitoring, compliance, enforcement and assurance is not forceful. There has been limited activity to enforce the EPBC Act over the 20-year period it has been in effect, and the transparency of what has been done is low.

He explained that the compliance and enforcement powers in the EPBC Act are outdated and that powers are restrictive and can only be applied in a piecemeal way across different parts of the Act due to the way it is constructed. The complexity of the legislation, impenetrable terminology and the infrequency with which many interact with the law, make both voluntary compliance and the pursuit of enforcement action difficult.

Further, monitoring, compliance, enforcement and assurance activities are significantly under-resourced.

The Independent Reviewer has recommended the establishment of an independent regulator for monitoring, compliance, enforcement and assurance activities under the EPBC Act. The role, as proposed, would not be subject to actual or implied direction from the Environment Minister. QRC does not support an additional regulator nor one that does not have appropriate oversight from Government. QRC agrees with the statement from Hon. Sussan Ley, Minister of the Environment, "*it will not, however, support additional layers of bureaucracy such as the establishment of an independent regulator*"[50].

IR 7.2, Residual risk and post-surrender obligations

Post-surrender obligations

As noted in the Draft Report, "*Queensland is currently undertaking reforms to its residual risk framework*"[51]. Relevant to IR 7.1, an outstanding concern for the resources sector is the lack of a legislative pathway to release holders (and related entities) from future liability in respect of the surrendered land, upon surrender. This is subject to a qualification that QRC has not suggested that companies should be released in respect of events caused by factors that were within the holder's knowledge and where false or misleading statements have been provided during the surrender process on which the Government relied.

QRC is of the position, and has expressed to DES, that without a clear expression of future liability release, it will remain a fundamental deterrent for resource companies ever to lodge surrender applications. Following surrender, companies effectively lose control over the sites and are placed at risk of being sued, in respect of residual risks that they have fully disclosed and paid for. This contingent liability will never be removed from the company balance sheets unless legislation confirms that the company is no longer liable at this point. This is one of the most significant reasons why there have been no surrenders of major resource operations in the last 18 years.

[50] Australian Government (20 July 2020) Media release from the Hon. Sussan Ley MP, Minister for the Environment, *Reform for Australia's environment laws*

[51] Draft Report, page 216

Historically, small operators have avoided this liability by going into liquidation. This is not an option for major operators. The ongoing liability post successful surrender is a 'show-stopper'. It means that for nearly all tenures companies would simply be unable to utilise the surrender provisions and would need to remain in control of the land indefinitely, preventing this land from being returned to non-mining landowners.

Essentially, there are two available pathways for a resources company to remain liable post-surrender without legislation stating to the contrary:

- Common law; and
- Statute.

Of these, common law is much more likely.

Typically, external insurance could be expected to be commercially available for the residual risk pool (i.e. the model proposed to be adopted by the Queensland Government similar to the Financial Provisioning Scheme) to cover the types of events with a low risk of occurring, but that would have catastrophic consequences if they did occur. Insurance would not be expected to be a commercial option in relation to gradual issues (as opposed to sudden events) and it is expected that the investment of the residual risk pool by the State would essentially operate as Government self-insurance for such risks.

A hypothetical example of the type of event that could be commercially covered by the Government's external insurance would be a significant earthquake, in an area not previously prone to earthquakes, where the rehabilitation had not been designed and had not been required to be designed to address the risk of such an earthquake, and causing costly damage to neighbouring landowners. For example, as a result of a loss of containment from an item that had been deeply buried and encapsulated until the natural disaster.

The external insurance company's customer ('the insured') would presumably be the Queensland Government, represented by the holder of the residual risk pool, for example, the Scheme Manager. It is not anticipated that the customer of the external insurer would be the resources company. This means that, if the aggrieved neighbouring landholder institutes legal proceedings against both the Queensland Government and the resources company, the Queensland Government's risk would be covered by insurance, but the resources company would not be covered by that insurance.

Typically, the neighbouring landholder could be expected to institute legal proceedings based on a 'tort' (a common law form of action) and not statute law. The most common example of a tort is negligence, although there are also others[52]. The claim could also be from a subsequent landowner, even though the land may have changed hands multiple times after having been sold by the resources company, so that there was no contractual relationship between the resources company and the subsequent landholder[53]. An example of the type of claim that

[52] Australia has very few examples of mines that have been surrendered where the former holder has remained in existence. Consequently, it is necessary to look to overseas examples of cases where landowners have sued the former holders of mines. An overseas analagous example is Willis v Derwentside District Council [2013] Env. L.R. 31. The land comprising the former mine had been transferred by the National Coal Board to a local government subject to a covenant to fill in the mine shafts and an indemnity excluding the NCB from any liability or expense not associated with mining operations. The Council failed to carry out the works and disputed the scope of the indemnity, insisting that the National Coal Board was liable. While the dispute continued, a tenant's livestock died from gas emissions from the former mine shafts. The tenant was ultimately successful against the local government, based on the torts of nuisance and negligence.

[53] In the analogous situation of a building that had changed hands multiple times, *Bryan v. Maloney* (1995) 128 ALR 163, a home owner was able to bring a negligence action against the original builder for defective construction, despite the property having changed hands multiple times and the subsequent owner having no contractual relationship with the original builder - the house itself was the proximate link and the builder owed a duty to the plaintiff as a future

could be made against the Government is that the natural disaster risk was foreseeable and that the Government was negligent for not imposing higher standards of rehabilitation. Similarly, the landowner may claim that the resources company's rehabilitation as negligent.

Contracts of insurance also normally involve 'subrogation', which essentially means that the insurance company is entitled to step into the shoes of the insured customer and take over decisions in the litigation. For example, even if the Queensland Government (as a 'model litigator') believes that it would be morally wrong to maximise the litigation strategy of passing on liability to the resources company when the company had already given a residual risk payment to the government to cover the risk that has crystallised, the insurance company would be contractually entitled to make this decision. A major customer, such as a government, could insist on including a contractual exemption in the insurance contract, whereby the insurance company waives subrogation[54].

However, from the resources sector's perspective, not being a party to the insurance contract, this would be an insecure arrangement, because the Government could choose to vary this exemption without consultation with the resources sector at any time, for example, to reduce insurance premiums. It would obviously be more secure and more transparent, if the Government has legislated a release and indemnity for holders who have successfully surrendered their tenements.

In the absence of such a legislative provision, it has been normal for resources companies around the world to have to be wound up shortly after surrender. Historically, this has often been a workable solution to avoid perpetual ongoing contingent liability (and associated ongoing insurance for the company). However, it is inconvenient, for major companies with multiple operations, or even where a holder has multiple tenements within the same complex, some of which have been completely rehabilitated and (if surrendered) could be returned to commercially productive post-extraction land uses. But this cannot occur because the same holder has other adjoining tenements that are still operational or under construction and consequently cannot be wound up.

If the company is not wound up, the contingent liability remains on the company's accounts or its parent's accounts (essentially, a form of self-insurance) in accordance with *AASB 137 Provisions, Contingent Liabilities and Contingent Assets (as amended)*. Alternatively, the company can insure the risk. However, this is obviously unfair if the company has disclosed all known residual risks, put in place a management plan, paid a residual risk payment to the State,

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purchasers. An analogous situation occurred in *Armidale City Council v Alec Finlayson Pty Ltd (1999) FCA 330*. There, the Council had approved (in the 1960s) a timber treatment plant on the site. Council was aware of soil contamination. In 1982, the land was purchased by Basia, and, based on expert reports accompanying the application, the council approved Basia's application for the rezoning of the land for residential use. The subsequent developer assumed the land was suitable for its zoned (residential) purpose, and when it was found that the land was not suitable (after houses had been built!) it sued the Council for negligence in granting the development approvals (**and sued but did not pursue Basia, who was insolvent**). There was no suggestion in the decision that Basia was not a proper party to the litigation - rather, it was not pursued only because of its insolvency. This case was quite similar to Butler v The State of Queensland (the Collingwood Park case) discussed at length in our previous submission.

[54] A good summary of the doctrine of subrogation and waiver is available at: https://www.allens.com.au/pubs/pdf/insur/pap7jun06.pdf Relevantly, this paper explains that a waiver of subrogation rights is often included in professional services contracts to minimize lawsuits and claims amongst the parties -The result is that the risk of loss is agreed among the parties to lie with the insurers, and the cost of the insurance coverage is contractually allocated among the parties as they may agree. The risk, once assigned to the insurers by the parties, is determined to stop there, without allowing the insurer to seek redress from the party "at fault." However, this would require the insurance contract to expressly include a waiver of subrogation rights as between the government and the mining company. An indemnity or release in favour of the mining company would also achieve the same result, however the traditional view seems to be that an indemnity in respect of fines (legislative) may not be not enforceable, and a contractual release would need to specifically include an indemnity in respect of legislative liability as well.

and is no longer in control of the land. It is also not necessarily in the best interests of local communities and the development of their post-extraction economies, for resources companies to have to wait until every tenement they hold has ceased operations before they can surrender all the tenements at about the same time and then be wound up.

The most recent residual risk legislative proposals from the Queensland Government, as introduced into parliament on 18 June 2020, do not recognise the relief needed from any such future liability. QRC recommends that the Productivity Commission consider this matter further, and that extinguishing liability is deemed leading practice.

Managing residual risk

In the development of Queensland's residual risk framework, QRC is of the view that the following key matters should be considered (despite not all being reflective in current legislative proposals):

- Residual risk should be considered at surrender only as:
    - Before surrender, all costs relating to rehabilitation activities, environmental management, monitoring and maintenance and rectifying rehabilitation failures are borne by the company (in Queensland, the EA holder); and
    - Residual risk can only be quantified with a high level of certainty when the site has been fully rehabilitated;
- Residual risk, and any associated payment, should not be confused with or duplicate the requirements for financial assurance;
- Only '*credible*' residual risks, as opposed to all possible residual risks, should be identified, assessed and costed for the purpose of managing the land post surrender. A credible risk is an event that represents a plausible likelihood of occurrence and reasonable magnitude of consequences based on information available at the time;
- There should be flexibility in the way residual risk payment is calculated having regard to the site-specific considerations (e.g. standard calculator or expert panel);
- Residual risk considerations should accommodate the retention of infrastructure on the request of the next landholder or for the next use. In most cases, there would be zero residual risk associated with retained infrastructure. However, there may be some instances where there is some level of credible risk, which the subsequent landowner is comfortable with taking over contractually. This component should be carved out of the residual risk assessment and payment associated with surrender;
- A post-surrender management plan should be prepared and include identified credible residual risks, how they are to be managed, and an allocation as to which entity has responsibility for managing them (normally either landholder or government). The plan should be made publicly available via an appropriate register and on title. All responsible agencies or stakeholders should be required to comply with post surrender management plans;
- Where the Government maintains responsibility for any management, the State should have a mechanism to record its performance of the ongoing monitoring and maintenance responsibilities; and
- Ongoing company liability post successful surrender, including relevant assessment of credible residual risks and associated payment, should be removed through appropriate legislation.

QRC would be happy to provide the Productivity Commission with further information regarding the above.

2.5. INVESTMENT AFFECTED BY ABRUPT POLICY CHANGES, INCONSISTENCY AND UNCERTAINTY

2.5.1. Draft leading practices

DLP 8.1, Importance of consultation and clear policy objectives

QRC strongly supports DLP 8.1:

> *"Early public consultation on new policy proposals, accompanied by clear articulation of the policy rationale, can avoid policy surprises. Clear policy objectives aid consistent and predictable regulatory decision making".*

QRC members continue to point to regulatory uncertainty as a major barrier to investment. Increased regulatory uncertainty reduces investment confidence as it requires investors to anticipate or budget for a future regulator change in their assessment. This uncertainty leads to fewer projects progressing and higher funding costs for those projects that do proceed.

According to the QRC's Chief Executive Officer (CEO) Sentiment Index, which asks CEOs to nominate how eleven factors will impact their organisation over the next 12 months, negative sentiment towards uncertain and/or poor regulation was at a record high in June 2019, making it the number one concern for member companies. QRC member CEOs called out several concerns at the time:

> *"Regulatory hurdles are increasing the burden on mining companies to develop new projects in Queensland. The changes in legislation are not adding value"*
>
> *"the lack of a cohesive government position on coal mines is affecting public sentiment and that, as a consequence, is affecting investor and financial institutions confidence"*[55].

Providing regulatory certainty, particularly on the regulatory process, is the single most powerful tool available to policy makers to encourage resources investment. QRC continues to call for government agencies, when considering policy solutions, to:

- Conduct regulatory impact analysis to ensure a policy response is proportionate to risk and minimises regulatory burden;
- Consult early and engage meaningfully with stakeholders;
- Be transparent and accountable in actions; and
- Commit to continuous improvement.

The Queensland and Commonwealth Government have both developed frameworks to support regulatory certainty – creating Offices of Best Practice Regulation, which aim to encourage many of those principles listed above. However, engagement by government agencies with those Offices is poor and is discussed further in **Section 2.7.2** as it relates to IR 11.1.

2.5.2. Draft recommendations

QRC notes the Commission's earlier (2017) conclusions regarding the importance of resolving the issues confronting the Australian energy market in order to address sovereign risk. These uncertainties around climate policy have been left to fester unresolved in the three years since

[55] *QRC member CEO sentiment survey, June 2019*

the Commission recommended that Australian governments "*stop the piecemeal and stop-start approach to emission reduction*"[56].

As resource projects are often energy intensive and investments are made for an extended economic life, the investment uncertainty that the Commission noted in 2017 are elevated for the resource sector. As such, QRC strongly supports DF 8.2 that:

> *"Uncertainty about, and inconsistent climate change and energy policies across jurisdictions risks impeding resources sector investment."*

However, QRC supports the Interim Report recommendation against the addition of a specific climate change trigger under the EPBC Act in favour of regulation of emissions being dealt with by national-level strategies and programs.

2.6. COMMUNITY ENGAGEMENT AND BENEFIT SHARING CAN HELP MITIGATE IMPACTS ON LOCAL COMMUNITIES

2.6.1. *Draft findings*

DF 9.2, Negative externalities of resource projects on local communities and associated benefits

Resources are owned by the Crown on behalf of all Australians. As resources are not renewable, a royalty is paid to recognise the public ownership of the resource which is being extracted. Under the Federation, the States are the owners of minerals and oil and gas within their borders, while the Commonwealth Government owns offshore oil and gas.

Most royalties in Queensland are applied on an ad valorem basis – a percentage of the sale price or value of the product. As such, budget forecasts are exposed to volatility in terms of movements in exchange rates and commodity prices. For example, the 2019-20 Queensland Budget papers noted that in relation to coal:

> *"For each one cent movement in the A$-US$ exchange rate, the impact on royalty revenue would be approximately $74 million in 2019-20…*
>
> *A 1% variation in the average price of export coal would lead to a change in royalty revenue of approximately $54 million"*[57].

In Queensland royalties are treated as just another inflow to consolidated revenue, they are not hypothecated to specific regions, communities or projects. This reflects the basis that the resources belong to all Queenslanders, rather than belonging to those living above, nearby or in proximity to the resource. For this reason, the QRC also supports the Commission's DF 9.6 – that royalty revenues should be spent where community net benefits would be greatest.

The project assessment process is designed to identify minimise, mitigate and offset the local impacts of operations. The conditions imposed on projects during this assessment process are intended to address the negative externalities of the operation.

2.6.2. *Information requests*

IR 9.1, Shared infrastructure

Queensland's resource projects often serve as foundation customers for infrastructure investments that support a region more generally. For example:

- Queensland's coal seam gas investment wave drove further developments in renewable energy across the Western Downs region. Toowoomba and Surat Basin Enterprise said that

[56] Productivity Commission (2017) *Shifting the Dial: 5 Year Productivity Review*, Report No. 84, Canberra

[57] page 212-213

"Due to the emergence of the coal seam gas industry since 2012, the Western Downs region has seen significant power infrastructure upgrades. Legacy infrastructure from resources provides an ideal network for renewables developments"[58];

- Incitec Pivot's agreement with Power and Water Corporation to purchase gas for its Phosphate Hill facility underpinned greater investment in gas pipeline infrastructure for Queensland's North West region.[59] The deal supported the construction of the Tennant Creek to Mount Isa which at the time of the completion, Queensland's acting Minister for State Development, Manufacturing, Infrastructure and Planning said

  "is a big win for the North West, bringing a ready supply of energy and feedstock for local employers and the community"[60];

- The Mount Isa rail line, which connects the North West Minerals Province to Townsville, is a vital link in Queensland's minerals supply chain. The line supports the movement of more than $4 billion in commodities each year, 75% of which is minerals, fertiliser and acid. Continued demand by the resources sector for haulage supports the viability of the Mount Isa Line, making the haulage of cattle and general freight as well as passenger services possible [61]; and

- Fairbairn Dam in Gindie, near Emerald is Queensland's second largest water storage and was built to service urban, resource and agricultural demand for water. The Queensland Government case study cites the Dam as an example of regional development:

  "*Central Queensland, and Emerald Shire in particular, have achieved considerable growth and prosperity since the scheme's development some 30 years ago. Some of this growth can be directly attributed to the expansion of irrigated farming in the area following completion of the Fairbairn Dam. As much, if not more, can be attributed to the expansion in mining in the area during that period. However, without the availability of reliable water, a significant proportion of this mining development would not have been possible*"[62].

2.7. EFFECTIVE GOVERNANCE, CONDUCT, CAPABILITY AND CULTURE ARE CRUCIAL FOR LEADING PRACTICE REGULATION

2.7.1. Draft recommendations

DR 11.1, Cost recovery

QRC recognises that adequate funding is linked to Government resourcing and service delivery. However, QRC cautions the use of open-ended drafting of DR 11.1 when recommending "*opportunities for enhancing regulators' cost recovery processes*". Without appropriate qualifications, there is the potential for unintended consequences. Further, with the rising costs associated with developing projects, additional cost recovery may act as a disincentive to project investment.

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[58] TSBE, *Renewable Energy in the Western Downs*

[59] IPL, ASX release, *IPL announces long term gas agreement for Phosphate Hill Fertiliser Manufacturing Plant*, 17 November 2015

[60] Queensland Government, Joint Media Statement – *Gas pipeline fires up north-west…and beyond*, 14 December 2018

[61] Queensland Rail Limited (2019) *Queensland Rail Annual and Financial Report 2018-19*
Queensland Government, Joint Media Statement – *Mount Isa Line plan puts North West minerals freight on fast track*, 9 June 2019

[62] *Queensland Government Submission to the Inquiry into Infrastructure and the development of Australia's regional areas, Attachment 1m*, page 1

Should Governments consider cost recovery opportunities, QRC recommends the following:

- Cost recovery should be equitably applied to all industries, linked to actual costs incurred by Government and not the capacity of a proponent to pay;
- Cost recovery should be capped and not duplicate any other fees/charges incurred as a result of separate State/Territory and Commonwealth approvals processes;
- Costs recovered should remain directly linked to the level of service and remain associated with the administering authority (and managing unit). Governments must demonstrate how regulatory processes, resourcing and service delivery will be improved with the funding. QRC has also raised this issue in its Streamlining Report[63];
- Higher levels of cost recovery should not lead to an increase the information requirements or documents required by proponents;
- Cost recovery should not, nor be seen to, compromise the objectivity of decision making by the assessor. Decisions should ultimately be based on the potential risks associated with a project application;
- A service agreement with the proponent should be developed at the commencement of the assessment and approvals process. The agreement should clearly articulate the level of service to be provided, defined outcomes, the fees to be levied, and any required staging of payments;
- Cost recovery should not remove the need for Governments to remain vigilant with respect to project applications and to continue to look at opportunities to gain efficiencies in the process; and
- Cost recovery should be regularly and independently audited to ensure accountability and value for money.

The above should be reflected in the Draft Report and, to a lesser extent, in DR 11.1.

2.7.2. Information requests

IR 11.1, Regulator accountability

An institutional reform in Queensland that initially showed great promise was the establishment of the Office of Best Practice Regulation (OBPR) within the Queensland Productivity Commission. The OBPR is formally tasked with "*supporting agencies to apply effective and rigorous regulatory impact analysis (RIA) and consultation to inform policy development*". Unfortunately, QRC's experience has been that the expertise of OBPR is often bypassed by regulatory agencies, either entirely or procedurally – by engaging only once a decision has been made.

Regrettably, when a regulatory impact assessment processes is run, agencies often fail to consult effectively. Rather than using a regulatory assessment process to draw out the views of stakeholders and identify the best solution, QRC's experience is that agencies tend to defend 'their' decision. *Consulted at*, rather than *consulting with*, is a common complaint of participants who often see very little evidence of their feedback reflected in a decision.

QRC's experience suggests that the first point of call for many regulatory agencies is to brush up on the exemption process to avoid what they would characterise as the "*inconvenience and delay*" of a genuine regulatory impact statement. Given the Government's extensive regulatory and legislative agenda, the list of completed regulatory impact statements would seem to give

[63] Queensland Resources Council (2020) *Streamlining Report*, page 43

testament to QRC's anecdotal experience that a regulatory impact statement is the exception rather than the rule.

2.8. REFORM PRIORITISATION

QRC recommends that the Productivity Commission include an approach to prioritising draft leading practices and recommendations. QRC is of the view that measures to improve administrative issues be considered first given these can be progressed immediately without the need for legislative amendments. This could be followed by (or progressed in parallel with) staged legislative amendments on more substantive changes, which require additional time to be developed and considered by Government and stakeholders.

2.9. INTERACTIONS WITH THE REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

With the release of the Interim Report, QRC has identified key themes (although of a narrower scope) that are relevant and align with the Draft Report:

- The need to shift away from complex processes and prescription to simplified, outcomes-based regulation largely driven by the proposed National Environmental Standards and other initiatives, including:
    - Policy simplification;
    - Improved legislative drafting, including changing construct, minimising content to only necessary detail and clearly defining important concepts;
    - Reducing the number of statutory tests;
    - Clarifying information requirements;
    - Greater use of regional planning; and
    - Improved data, information, and monitoring.
- Allocating different projects to different assessment tracks depending on their level of risk, including consideration of standard conditions;
- Greater devolution to the states and territories to reduce delays, duplication and inconsistency between the Commonwealth and other jurisdictions;
- Improvements in the accessibility of information and overall transparency of processes and documents;
- Enhanced regulator resourcing and capability; and
- Shift to a financial-based mechanism for offsets.

Reform of the same or similar nature under the EPBC Act review and the Productivity Commission's review should be advanced in unison.

3. COVID-19 RECOVERY OPPORTUNITIES

Since the review began, Australia has faced an unprecedented economic and social threat from the COVID-19 pandemic. As Australia now turns to rebuilding the economy, sensible reform to resources regulation can not only help sustain a strong and productive industry but also facilitate accelerated job creation and the sharing of benefits to communities.

3.1. INTERACTIONS WITH THE REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

In April 2020, the Hon. Sussan Ley, Minister for the Environment, expressed that duplication and barriers of the EPBC Act are hindering projects and job creation in a time of recovery. She committed to cutting green tape following delivery and consideration of the Interim Report from the Independent Reviewer[64,65]. QRC supported the Minister's commitment for streamlining.

Subsequently, on 20 July 2020, the Minister announced priority commitments in response to the Interim Report "*to ensure the right protection for our environment while also unlocking job-creating projects to strengthen our economy and improve the livelihoods of every-day Australians. We can do both as part of the Australian Government's COVID recovery plan*". The Commonwealth Government is to:

- "*Develop Commonwealth led national environmental standards which will underpin new bilateral agreements with State Governments*; and
- *Commence discussions with willing states to enter agreements for single touch approvals (removing duplication by accrediting states to carry out environmental assessments and approvals on the Commonwealth's behalf)*"[66].

Given the Government is to integrate the existing bilateral mechanism with the new National Environmental Standards, it would be appropriate to progress the Productivity Commission's recommendations in line with the above commitments. However, this process should not be rushed, and as recognised by the Independent Reviewer, should be undertaken in consultation with experts and stakeholders.

While not expressed by the Government as a priority, in line with the Independent Reviewer's phased approach to reform, QRC supports fixing long-known issues first, in particular reducing duplication, inconsistencies, gaps and conflicts in the EPBC Act. QRC considers relevant recommendations made by the Productivity Commission could be progressed in line with any proposed changes to the operation of the EPBC Act. QRC recommends that the Productivity Commission seek to maximise on Government's commitment and phase one of the proposed reforms in the Interim Report.

3.2. QRC STREAMLINING REPORT

The first Streamlining Report was released by industry in 2010. At this time the resources sector was seeking reforms to enhance growth opportunities after the Global Financial Crisis. The resources industry was pegged to shoulder the responsibility to boost Queensland's economy. Many businesses fell under the pressures of falling revenues and were unable to reign in high operating costs.

The 2010 report delivered many growth reforms for the resources sector and this in turn translated to stable employment levels and in conjunction with a period of strong commodity prices delivered a sequence of new project opportunities in the Galilee Basin, some of which are progressing towards being operating mines. The 2009-11 reforms supported record sector investment which peaked for Queensland in 2012-13 at around $38 billion in direct expenditure.

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[64] The Australian (23 April 2020) *Coronavirus Australia: Green tape to be cleared for recovery*

[65] Australian Government (23 April 2020) *Media release from The Hon Sussan Ley MP, Minister for the Environment, Congestion busting assessments protecting our environment and our economy*

[66] Australian Government (20 July 2020) Media release from the Hon. Sussan Ley MP, Minister for the Environment, *Reform for Australia's environment laws*

The timing of the second tranche of streamlining reform and the needs of the sector for the next decade have never been more important as it faces a different and yet familiar challenges with COVID-19.

So why is a modern regulatory system critical to the resources sector? Fundamentally, regulation seldom evolves at the same rate of the industries they govern. This is true other industries such as modern medicine, information technology and artificial intelligence, automation and robotics. This is not specific to Queensland, or even specific to Australia.

A stable framework is a robust regulatory framework, however there is a need to find ways to maintain stability as well as have a regulatory framework that advances with the innovations of the industry. It's well understood current regulatory frameworks are not well suited to a quick change. The recent COVID-19 pandemic has put a spotlight on our ability to respond quickly.

Unfortunately, resources sector regulation is complex, duplicative and in some areas completely outdated. This has a direct impact on the way the sector operates. QRC's Streamlining Report identifies problem areas that impede on the sector's ability to operate efficiently and productively in Queensland. QRC has prioritised 20 recommendations from a broader pool given they each have a direct impact on:

- Productivity and output;
- Jobs for Queensland; and
- Queensland maintaining a global competitive advantage.

All of which can aid the recovery to COVID-19.